No. 80-1787

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN L. BREWER AND ANITA W. BREWER, *Petitioners,*

v.

MEMPHIS PUBLISHING COMPANY, INC., *Respondent.*

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether this Court should grant a Petition for a Writ of Certiorari in a defamation action in which the court of appeals applied the first branch of this Court's public figure standard to two local celebrities who had achieved "pervasive fame" in the region served by the defendant newspaper.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

1. Petitioners' Celebrity Status.

Respondent Memphis Publishing Co. publishes *The Commercial Appeal,* a daily newspaper sold since before the Civil War to the people of the mid-south, the area surrounding Memphis, Tennessee which includes large portions of northern Mississippi. In recent history, two subjects have captured the interest of the local population of the mid-south as much as, if not more than, any others: Elvis Presley and "Ole Miss" football.

Elvis Presley was born in Tupelo, Mississippi, some 100 miles from Memphis, and resided in Memphis throughout his adult life. When he died on August 16,

1977, 200,000 mourners crowded the City's streets, and the mayor ordered all residents to fly flags at half mast.[1] Each day, from 6,500 to 10,000 people visit Graceland, Presley's home, as well as the Presley museum, the studio where he made his first record, and the City's official statue erected in honor of its favorite son.[2] From Elvis Presley Boulevard to the Elvis Presley Trauma Center at the City of Memphis Hospital, the mid-south region continues to pay tribute to the phenomenon it helped create.[3]

Similarly, the mid-south's interest in football centers on the collegiate games played by the University of Mississippi, a "home" team of the region. Some 349,673 persons annually attend "Ole Miss" games.[4] The team plays a number of games each season in Memphis, often selling more tickets than the 50,180 Liberty Bowl seats.[5] For those who cannot attend personally, the "Ole Miss"

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[1] Commercial Appeal, Aug. 17, 1977, at 1, col. 5.

[2] *Id.*, June 14, 1978, at 44, col. 1; *id.*, Mar. 26, 1981, at 10, col. 1; *id.*, Aug. 15, 1980, at A1, col. 5.

[3] *Id.*, Jan. 10, 1981, at 14, col. 1; *id.*, Aug. 17-21, 1977, at 3, col. 1. The magnitude of the Presley phenomenon, as the court below recognized, is awesome, if somewhat baffling. Brewer v. Memphis Publishing Co., 626 F.2d 1238, 1248 (5th Cir. 1980) (also contained in Appendix to Petition for Certiorari at A1, A22) [hereinafter cited as Brewer, with page citations to Appendix to Petition for Certiorari]. It seems apparent that the man grew to symbolize for a large segment of the population much more than merely the most popular musician of his generation. *See S. Shaver & H. Noland, The Life of Elvis Presley* 46-47 (1979).

[4] 1980 Rebel Football Guide 2 (1979).

[5] *Id.*; 1979 Rebel Football Guide 2 (1978); 1978 Rebel Football Guide 2 (1977); 1980 Memphis State University Football Guide 56 (1980).

football coach hosts a successful weekly program on Memphis television, featuring highlights of each game.[6] All told, the University of Mississippi budgets $2,392,946 annually for its collegiate football program,[7] which regularly graduates players to the professional football leagues.[8]

No two figures have sought association with the twin fascinations of the mid-south more assiduously than petitioners Anita and John Brewer. Anita Wood Brewer ("Anita") first entered the public spotlight in the early 1950s in Jackson, Tennessee, a mid-south community, where she was a radio and television personality.[9] She hosted her own program — "Antics of Anita" — on which she played records, sang, and conducted interviews.[10] In 1957, Anita auditioned for and was selected to star in "Top Ten Dance Party," a television program produced by a major Memphis station.[11] Soon after her arrival in Memphis, Anita met Presley and for six years thereafter, the two conducted a highly publicized romance.[12] Presley proclaimed to the public that Anita was his "number one girl," and the couple voluntarily, even eagerly, informed the press of the most intimate details of their life together.[13] In numerous interviews

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[6] Commercial Appeal, Oct. 19, 1980, at TV2, cols. 1-3.

[7] Letter from Board of Trustees, Institutions of Higher Learning, Mississippi, to Counsel for Respondent, May 19, 1981, at 1 (on file with Clerk).

[8] 1980 Ole Miss Media Guide 152-53 (1980).

[9] Brewer, at A21.

[10] *Id.* at A21; Joint Appendix, Brewer v. Memphis Publishing Co., No. 77-2254, at 1062, 1075 (5th Cir. 1980) [hereinafter cited as App.]

[11] App. at 1016, 1062, 1063, 1986; Brewer, at A21.

[12] Brewer, at A22.

[13] *Id.*

and pre-arranged photograph sessions, Presley and Anita told the press and public of the many lavish gifts he bestowed upon her, including an automobile, a diamond ring with eighteen sapphires, and a wristwatch wrapped in a $100 bill.[14] At perhaps the most publicized military induction in history, Anita stood by Presley's side when he invited the press to witness the formal ceremony in which he entered the United States Army.[15]

Identification with Presley naturally enhanced the public career and prominence of Anita as an entertainer and celebrity. In addition to starring in "The Anita Wood Show" in Memphis, she entered and won a "Hollywood Star Hunt" contest in New Orleans.[16] She signed a seven-year movie contract with a motion picture studio, made public appearances all over the country promoting her career, and performed in nightclubs in a number of major cities.[17] Anita also advanced her career as a singer, making a number of recordings which were distributed and well received, particularly in the Memphis area.[18] On numerous occasions, Anita appeared and sang on national television, first as a "guest" on the "Tonight" show, and then as a regular featured performer on the "Andy Williams Show."[19] Anita's career was promoted by the William Morris Agency, a prominent talent booking agency.[20]

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[14] App. at 1101, 1103, 1104.

[15] *Id.* at 1154, 1161.

[16] Brewer, at A21.

[17] *Id.*

[18] *Id.*; App. at 1080-84.

[19] Brewer, at A21-A22; App. at 1034-35, 1064, 1067-68, 1086.

[20] App. at 1077-78, 1203.

Nowhere is Anita's fame greater than in the mid-south region surrounding Memphis. She has appeared in plays and television commercials in Memphis, the latter capitalizing on her prominence and endorsement to entice viewers and listeners to purchase various products.[21] From 1962 through 1964, long after her relationship with Presley had ended, she continued to appear as a singer on a weekly Memphis television program.[22] Also during this period, she married petitioner John Brewer ("John"), a former football star at "Ole Miss" and at that time a famous professional player.[23] From 1964 through 1972, she received substantial publicity relative to both her own fame and her relationship with Presley.[24] She continued to sing publicly and to appear in local theatrical productions.[25] Indeed, at the time of the publication at issue the Anita Wood Fan Club in Memphis was still in existence and had an active president.[26] According to Tennessee State Senator James H. White, "anyone's been around the mid-south more than a few years knows of Anita Wood."[27]

While Anita has become a household word in the mid-south by virtue of her association with Presley and her own career as a singer and actress, John climbed to

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[21] Brewer, at A21; *see* Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1294 n.15 (D.C. Cir.), *cert. denied,* 101 S.Ct. 266 (1980) ("A person's power to capitalize on his general fame by lending his name to products, candidates, and causes, indicates the broad influence he has.")

[22] Brewer, at A21.

[23] *Id.* at A22.

[24] App. at 1151-55, 1173-80.

[25] *Id.* at 1086-89, 1192.

[26] *Id.* at 1029, 1105.

[27] *Id.* at 1772.

equivalent celebrity status through his career as an "Ole Miss" and professional football star. He was a much-heralded member of the 1960 "Ole Miss" team, which earned great fame when it won the national collegiate championship.[28] As a star of that team, John became a hero in the mid-south, and was named to collegiate all-star teams.[29] He capitalized on his collegiate experience by signing a professional contract with the Cleveland Browns. As a member of the Browns from 1960 through 1967, he frequently performed on television and received extensive publicity, especially in the mid-south.[30] In 1968, he "returned" to the region, becoming a member of the South's new team, the New Orleans Saints.[31] When his professional football career ended in 1970, he successfully used his celebrity status, in his own words, "to open business opportunities" for himself "for the rest of [his] life."[32] He purchased newspaper advertising inviting his "friends" to patronize his real estate business, and he opened the "Johnny Brewer Catfish House," which featured photographs and other memorabilia from his football career.[33] Twice he sought to convert his football fame to political fortune, running for the Mississippi House of Representatives in 1976[34] and 1979.[35] Unsurprisingly, he cultivated the legend of a former football star by speaking frequently at sports

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[28] Brewer, at A23.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] Vicksburg Evening Post, Nov. 7, 1979, at 1, col. 1.

banquets and by organizing and coaching sports programs.[36] In the words of former *Commercial Appeal* City Editor William Sorrells, "John Brewer will always remain a Saturday hero."[37]

2. The News Report At Issue.

The newspaper article that Anita and John found defamatory appeared in *The Commercial Appeal's* "People" column on September 8, 1972.[38] The article had its origins in a telephone conversation between James Kingsley ("Kingsley"), a veteran reporter for *The Commercial Appeal,* and his sister, the wife of the Chairman of the Board of *Banker's News,* a daily newspaper for the banking industry.[39] Kingsley's sister told him that a woman identifying herself as Anita Wood from the Memphis area had recently been in the dress shop of the Las Vegas Hilton Hotel and said she was there to attend Presley's nightclub show.[40] In the past, Kingsley's sister, a resident of Las Vegas and New York, had provided reliable information to him that had led to the publication of various news reports.[41] Kingsley, aware of the continuing public interest in these two local celebrities, informed Hope Pectol ("Pectol"), editor of the newspaper's "People" column, who pursued the possible story. Pectol located *The Commercial Appeal's* files on Anita and Presley, which contained ar-

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[36] Brewer, at A23.

[37] App. at 1912.

[38] Brewer, at A43-A44. It is self-evident, but relevant to note, that the *sine qua non* of being mentioned in such "People" columns, a staple of daily newspapers, is pervasive fame or notoriety.

[39] App. at 1989, 1990, 2037.

[40] Brewer, at A43-A44.

[41] *Id.* at A44.

ticles about their respective careers. After reading recent articles concerning Presley's marital problems, she confirmed with Kingsley, who had covered him for a number of years, that Presley had recently filed for divorce.[42] She also learned from Kingsley that Anita had married John Brewer in 1964, but that they were also divorced.[43]

In an effort to verify these facts in time for the story to be included in the following day's edition, Pectol asked Kingsley to call his sister again. While Kingsley waited, his sister telephoned a clerk at the Hilton dress shop who confirmed that Anita Wood had visited there and spoke of attending Presley's show.[44] Kingsley also asked knowledgeable staff members at the newspaper about the Brewers' marital status, and confirmed that they were separated.[45] In fact, Anita had twice brought actions for separate maintenance from her husband in Louisiana, and had once been granted a decree of separation there on the ground of abandonment.[46]

Satisfied that her information was accurate, Pectol wrote a news report:

> FLICKERING FLAME: Back in 1957 Anita Wood, who came from Jackson, Tenn., to Memphis to sing on TV, was Elvis Presley's "No. 1 girl." This week as Elvis closed his month-long show at the Las Vegas Hilton, Miss Wood stopped by the hotel for what

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[42] *Id.* at A44-A45.

[43] *Id.* at A45.

[44] *Id.*

[45] *Id.*

[46] *Id.* at A46.

> appeared to be a "reunion" of two old friends. Elvis recently filed for divorce from his wife of five years, Priscilla. Miss Wood is divorced from former Ole Miss football star Johnny Brewer.

Neither Kingsley, Pectol, or those editors who reviewed the report prior to publication entertained any doubt about its accuracy.[47]

When this article appeared in *The Commercial Appeal*, John and Anita resided in Bay St. Louis, Mississippi, some 300 miles from Memphis. Not a single copy of the newspaper was distributed in Bay St. Louis.[48] Indeed, the article had no effect on the Brewers' personal or family relationships, social life, or business dealings. Eight months later, Anita and John, through their attorney, gave *The Commercial Appeal* formal notice that they considered the article false and defamatory.[49] Promptly after receiving the Brewers' letter, the newspaper published the following "Correction":

> CORRECTION—On September 8 of last year an item in this column reported that the former Anita Wood, now Mrs. John Brewer, had been in Las Vegas, Nev., a few days previously and had stopped by the Las Vegas Hilton to visit Elvis Presley, an old friend, who was entertaining there. That apparently was a case of mistaken identity, because Mrs. Brewer says she was not in Las Vegas on or anywhere near that date. The item also said she and former Old Miss football star Johnny Brewer were divorced, which was incorrect. The Commercial Appeal regrets the error.

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[47] *Id.* at A45-A46.

[48] App. at 632.

[49] Brewer, at A5.

3. The Litigation.

Unsatisfied, Anita and John instituted companion defamation actions on June 23, 1973 and September 6, 1973, respectively, in the United States District Court for the Southern District of Mississippi. In 1974, a jury awarded them an aggregate of $800,000 in damages, after being instructed by the trial judge that the article constituted libel *per se* and that the law of Mississippi therefore required strict liability and an award of presumed damages. Although the trial was held long after this Court's decisions in *Curtis Publishing Co.* v. *Butts*[50] and *Associated Press* v. *Walker*,[51] Judge Harold Cox declined to consider whether plaintiffs were "public figures" who must prove constitutional malice in order to recover. The judge did, however, find the verdicts excessive and granted a new trial *on damages alone.* A second jury awarded Anita $250,000 and John $150,000, later reduced on remittitur to $100,000 and $50,000, respectively. The United States Court of Appeals for the Fifth Circuit reversed, concluding that both previous trials were "infected" by errors,[52] including Judge Cox's failure even to address the public figure question, his decision that strict liability was warranted, and his instruction that presumed damages were appropriate. In addition, the court of appeals explicitly advised the district judge that, on retrial, the public figure question "should first be addressed by the trial court."[53]

In the third trial, however, Judge Cox decided, at petitioners' insistence, that the *jury* should decide

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[50] 388 U.S. 130 (1967).

[51] *Id.*

[52] Brewer, at A6.

[53] Brewer v. Memphis Publishing Co., 538 F.2d 699, 703 (5th Cir. 1976).

whether plaintiffs were public figures. As a result, the third trial ended in verdicts for the plaintiffs, contradictory jury findings, and damage awards of $150,000 to Anita and $60,000 to John. The newspaper again appealed, citing no less than 20 major issues of reversible error under state and constitutional law.

Over the course of 32 months after briefs were filed, the court of appeals conducted an exhaustive *de novo* review of the entire record, including substantial amounts of evidence relating to the Brewers' public figure status which had been excluded by the trial judge. The court held that (1) Judge Cox committed reversible error when he ignored its explicit instructions on the first appeal and permitted the jury to determine a question of law, namely the public figure status of the plaintiffs; (2) "undisputed portions of the evidence required the trial judge to find both Anita and John Brewer public figures"[54] in the mid-south when the article was published there; and (3) evidence amassed during the course of three trials failed to establish the requisite constitutional malice. Thus, the court of appeals reversed and dismissed the action.

The court of appeals declined to consider a number of errors of state and constitutional law raised by the newspaper,[55] including questions of the standard of care in defamation suits in Mississippi, the application of Mississippi's choice-of-law provisions, the exclusion of a plethora of relevant evidence pertaining to the public figure question, and the conspicuous absence of any "competent evidence" of "actual injury."[56] The court determined that, in the wake of three jury trials, efficient

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[54] Brewer, at A21.

[55] *See, e.g., id.*, at A9 nn.5-8, A19 n.12.

[56] Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974). On both appeals to the Fifth Circuit, respondent has respectfully

judicial administration called for the resolution of clearly case-dispositive issues of constitutional law, rather than an analysis of errors of state law and possible fourth trial. Accordingly, numerous grounds for reversal have never been addressed by an appellate court.[57]

REASONS FOR DENYING THE WRIT

The Court Of Appeals Correctly Applied The First Branch Of The Public Figure Standard Explicated By This Court And Concluded That Petitioners Had Not Demonstrated The Requisite Constitutional Malice To Permit Recovery

The court of appeals decision represents no more than a commonplace application of the so-called first

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asserted that the excessive verdicts in three separate trials were not merely unsupported by competent evidence, but actually reflected a rather consistently displayed bias held by the trial judge against the newspaper. During the first trial, the court addressed counsel for the newspaper in the presence of the jury as follows:

> I haven't seen anything yet that you have offered in evidence that offers any defense to what they wrote about this woman. [It] wasn't accurate and I thought it was very hurtful to her.

Joint Appendix, Brewer v. Memphis Publishing Co., No. 75-1073, at 183 (5th Cir. 1976). Later, on a motion for mistrial based on the above-quoted statement, the court added:

> I meant exactly that, because I think these newspapers have got the wrong idea about what the constitution entitles them to; and I don't think they would make any misstatements about people, about the serious right of matrimony and the relationship between people that are married, people that are decent and indecent, and get away with it, not in this Court not so long as I sit here. . . . *I think it was completely unjustified, completely inexcusable*, and I don't think they have even half way undertaken to excuse themselves for it. . . . *I think their statement* under the circumstances *was reprehensible* . . . and I'm glad for the editor to hear me say that because that's exactly what I think about it. . . .

Id. at 231-32 (emphasis added).

[57] For this reason alone, the instant petition does not warrant the issuance of a writ of certiorari. *See R. Stern & E. Gressman, Supreme Court Practice* 490 (5th ed. 1978).

branch of the public figure standard adopted by this court in *Curtis Publishing Co.* v. *Butts* and *Gertz* v. *Robert Welch, Inc.*[58] The court of appeals, the first court to consider the issue in this litigation,[59] correctly held that both plaintiffs were public figures at the time of the article at issue because they had achieved "pervasive fame" in the mid-south, where it was published.[60] Like former college football coach Wally Butts, the first person ever held to be a public figure by this Court, both John and Anita "commanded a substantial amount of independent public interest at the time of the publications."[61] As a professional entertainer and as the

[58] 388 U.S. 130 (1967); 418 U.S. 323 (1974).

[59] The court of appeals determined that, regardless of the resolution of the public figure issue below, it was reversible error to submit the question to the jury. Brewer, at A20. It is well-settled that "it is for the trial judge in the first instance" to determine if the plaintiff is a public figure. Rosenblatt v. Baer, 383 U.S. 75, 88 (1966); *accord,* Rosanova v. Playboy Enterprises, Inc., 580 F.2d 859, 861-62 (5th Cir. 1978); *Restatement (Second) of Torts*, §580A, comment c, at 207.

[60] Brewer, at A33. In *Gertz*, this Court noted that public figures are those who either (1) achieve "pervasive fame or notoriety," 418 U.S. at 351, or (2) "thrust themselves to the forefront of particular controversies in order to influence the resolution of the issues involved," *id.* at 345; *accord*, Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967) (plurality opinion of Harlan, J.); *id.* at 163 (Warren, C.J., concurring). The second branch of the *Butts* and *Gertz* standards, which requires that the plaintiff voluntarily take part in the resolution of a "public controversy," is not at issue in this case.

[61] Curtis Publishing Co. v. Butts, 388 U.S. 130, 154 (1967) (plurality opinion of Harlan, J.). *Gertz* leaves no doubt that a public figure need not achieve "pervasive fame" on the national level; there need only be "clear evidence of general fame or notoriety in the community," especially where, as here, the news report at issue is contained only in the local press. 418 U.S. at 351-52; *accord,* Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1292 n.22 (D.C. Cir.), *cert. denied*, 101 S. Ct. 266 (1980) ("[N]ationwide fame is not required. Rather the question is whether the individual had achieved the necessary degree of notoriety where

"number one girl" of Elvis Presley, Anita had voluntarily sought public exposure and had succeeded in establishing herself as a household word in the Memphis area. By becoming a collegiate and professional gridiron hero, John had also achieved celebrity status, which he continues to exploit to this day. As the District of Columbia Circuit recently reiterated in a thoughtful analysis of those who become public figures by virtue of their "pervasive fame":

> Fame often brings power, money, respect, adulation, and self-gratification. It also may bring close scrutiny that can lead to adverse as well as favorable comment. When someone steps into the public spotlight, or when he remains there once cast into it, he must take the bad with the good.[62]

The court of appeals decision is consistent with an unbroken line of cases holding that sports and entertainment celebrities are public figures. Because of their "pervasive fame," courts have regularly held that public figure status attaches to well known television per-

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he was defamed — *i.e.*, where the defamation was published."); *cf.* Time, Inc. v. Firestone, 424 U.S. 448, 453 (1976) (although plaintiff had "perhaps" assumed "especial prominence" in Palm Beach society, involuntary participation in judicial proceeding rendered her private person for purpose of news report contained in *national* magazine).

[62] Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1294 (D.C. Cir.), *cert. denied*, 101 S. Ct. 266 (1980). In *Waldbaum*, the court explained that a public figure under the first branch of the *Butts* and *Gertz* standards "is a well-known 'celebrity' — his name a 'household word.' " *Id.* at 1294. Such individuals, this Court noted in *Gertz*, "usually enjoy significantly greater access to the channels of effective communication" than private persons and have "voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them." 418 U.S. at 344-45. As the court of appeals recognized, "[e]ntertainers (and sports figures as entertainers) typically put more of themselves in the public view than their particular performances; both plaintiffs in this case certainly did." Brewer, at A37.

formers,[63] movie actors,[64] stage performers,[65] professional athletes,[66] and collegiate athletes and their coaches.[67] As the Ninth Circuit has noted, the ranks of public figures "include artists, athletes, business people, dilettantes, anyone who is famous or infamous because of who he is or what he has done."[68]

The obvious applicability of the first branch of the public figure standard to this case exposes petitioners' disingenuous suggestion that the court of appeals deci-

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[63] *See, e.g.*, Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976) (Mr. and Mrs. Johnny Carson).

[64] *See, e.g.*, Perry v. Columbia Broadcasting Sys., Inc., 499 F.2d 797 (7th Cir. 1974), *cert. denied*, 419 U.S. 883 (1975) (actor who created role of Stepin Fetchit); Orbach v. New York News, Inc., 3 Media L. Rep. (BNA) 2229 (Sup. Ct. N.Y. Cty. 1978) (actor Jerry Orbach).

[65] *See, e.g.*, Vitale v. National Lampoon, Inc., 449 F. Supp. 442 (E.D. Pa. 1978) (well known singer in Philadelphia area); Man v. Warner Bros., Inc., 317 F.Supp. 50 (S.D.N.Y. 1970) (musician who performed before 400,000 people at Woodstock music festival); James v. Gannett Co., 40 N.Y.2d 415, 386 N.Y.S.2d 871, 353 N.E.2d 834 (1976) (professional bellydancer).

[66] *See, e.g.*, Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265 (3d Cir. 1979) (former professional football player); Time, Inc. v. Johnston, 448 F.2d 378 (4th Cir. 1971) (former professional basketball player); Cepeda v. Cowles Magazines & Broadcasting, Inc., 392 F.2d 417 (9th Cir. 1968) (professional baseball player).

[67] Bilney v. Evening Star Newspaper Co., 43 Md. App. 560, 406 A.2d 652 (1979) (college basketball players); Vandenburg v. Newsweek, Inc., 507 F.2d 1024 (5th Cir. 1975) (college track coach); Grayson v. Curtis Publishing Co., 436 P.2d 756 (Wash. 1968) (college basketball coach).

[68] Cepeda v. Cowles Magazines & Broadcasting, Inc., 392 F.2d 417, 419 (9th Cir. 1968). In contrast, petitioners' reliance on this Court's decisions in *Hutchinson* v. *Proxmire*, 443 U.S. 111 (1979), and *Wolston* v. *Reader's Digest Association*, 443 U.S. 157 (1979), is misplaced. Neither case considered the first branch of the public figure standard, but rather held that plaintiffs had not "thrust" themselves to the forefront of a "public controversy" under the second branch.

sion "resurrects the repudiated doctrine of *Rosenbloom* v. *Metromedia, Inc.*"[69] and "*create[s] a third category*"[70] of public figures. No amount of italic-typesetting will mask the fact that the court of appeals simply applied the first branch of the public figure standard set forth by this Court in *Gertz* and *Butts*, which standard focuses squarely on the "fame or notoriety" of the plaintiff regardless of the legitimacy of public interest in the specific article at issue. Indeed, it is the petitioners, by repeatedly characterizing the article at issue as "sensational" and "gossip," that invite this Court to "resurrect *Rosenbloom*" and rule that news reports about the activities of celebrities such as the Brewers are somehow illegitimate.[71]

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[69] Petition for Certiorari, at 6 (citing Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971)).

[70] Petition for Certiorari, at 8 (emphasis in original).

[71] Like petitioners, the trial judge repeatedly expressed his personal view that the article at issue was "not legitimate news" but was rather "libelous gossip and a defamation of character of both plaintiffs from start to finish." Brewer v. Memphis Publishing Co., Nos. 73W-26(c) & 73W-36(c), at A69 (S.D. Miss. Apr. 20, 1977) [page citation to Appendix to Petition for Certiorari]. Such evaluations of the subjective "worth" of press reports by a trial judge are in direct conflict with *Gertz's* admonition that such decisions must not be left to the "conscience of judges." 418 U.S. at 346; *see* Note, *The Editorial Function and the Gertz Public Figure Standard*, 87 Yale L.J. 1723, 1740 (1978) ("judiciary as an institution is not competent to determine" legitimacy of news reports). Moreover, under the first branch of the public figure standard, the content of the article at issue is of no relevance whatsoever. *See R. Sack, Libel, Slander and Related Problems* 199 n.80 (1980) ("Football coach Wally Butts . . . was *not* involved in any dispute on public issues at the time the offending article was published."); *cf.* Hutchinson v. Proxmire, 443 U.S. 111 (1979) (public figure status must be determined apart from article at issue). Nevertheless, there is significant evidence that news reports concerning celebrities further First Amendment values. *See, e.g.*, James v. Gannett Co., 40 N.Y.2d 415, 386 N.Y.S.2d 871, 353 N.E.2d 834, 839 (1976); Posner, *The Right of Privacy*, 12 Ga. L. Rev. 393, 395-96 (1976); Note, *supra*, at 1736-37 & n.84.

Petitioners' other thinly veiled strawman — *i.e.*, a so-called "retreat" from public figure status — is equally unavailing. The record below simply does not support petitioners' rhetorical attempt to portray this as a "retreat" case. The record leaves no doubt that neither John nor Anita ever made any effort — serious or half-hearted — to retreat from the celebrity they so carefully cultivated. On the contrary, John and Anita continued to exploit their fame by (1) running for political office and pursuing business opportunities, the success of which depended on continued celebrity status, and (2) performing and singing in public, respectively. More importantly, for purposes of applying the first branch of the public figure test, it is undisputed that they both remained "household words" in the mid-south at the time of the article at issue, rendering any unproven attempt at retreat manifestly unsuccessful.[72] As the prompt correction by *The Commercial Appeal* in the instant case illustrates, celebrities such as the Brewers "remain able to reply to attacks through the press, which is continuing to cover them,"[73] and therefore cannot claim an inability to set the record straight.[74]

[72] See Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1295 n.18 (D.C. Cir.), *cert. denied,* 101 S. Ct. 266 (1980) ("In rare instances, a celebrity may decide to abandon his prominent position in society to return to anonymity, but persistent press attention, most likely fueled by continuing public interest, may thwart his quest for privacy."); Bandelin v. Pietsch, 563 P.2d 395, 398 (Idaho), *cert. denied,* 434 U.S. 891 (1977). Indeed, as the court of appeals noted, the article at issue related directly to the primary source of Anita's continued fame — her relationship with Presley. *See* Brewer, at A41 (citing Time, Inc. v. Johnston, 448 F.2d 378 (4th Cir. 1971)); Rosanova v. Playboy Enterprises, Inc., 580 F.2d 859, 861-62 (5th Cir. 1978).

[73] Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1295 n.18 (D.C. Cir.), *cert. denied,* 101 S. Ct. 266 (1980).

[74] *See* Buchanan v. Associated Press, 398 F. Supp. 1196, 1203 n. 1 (D.D.C. 1975) (plaintiff is public figure because he successfully sought correction); Note, *supra* note 71, at 1747. In a concurring

Having concluded that John and Anita Brewer are textbook examples of public figures under the first branch of the *Butts* and *Gertz* standards, the court of appeals correctly analyzed the evidence in three separate trials and concluded that they had wholly failed to prove the requisite constitutional malice. The evidence revealed that neither reporter who worked on the story had any reason to doubt the information provided by previously reliable sources. In fact, they reconfirmed the information about the Las Vegas meeting before publishing. Although the reporters may have failed to make the fine distinction between legal separation leading to a divorce decree and divorce, neither had any reason to suspect they were technically in error. As this Court has made clear:

> reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.[75]

The court of appeals applied this standard to the facts before it, and correctly concluded that constitutional malice had not been proven.

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opinion in *Wolston* v. *Reader's Digest Association*, 443 U.S. 157 (1979), Justice Blackmun concluded that a successful retreat "may diminish the defamed party's access to the means of counterargument," *id.* at 170 (Blackmun, J., concurring), thereby necessitating the increased protection from defamation afforded a private person. In the instant case, however, petitioners' continued celebrity enabled them to secure a prompt correction of the article at issue — further evidence that they remained public figures.

[75] St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

CONCLUSION

After three trials and almost a decade of litigation, the court of appeals has at last conducted the threshold inquiry that should have been made, but was not, at the first trial. It has done so painstakingly, reviewing a massive amount of evidence on the public figure question and drafting a scholarly opinion that addresses all applicable precedent and all contentions raised by petitioners, even those which are unsupported by the record.

In striking an equilibrium between constitutional and state interests in the law of defamation, this Court has constructed broad rules of general application and has permitted lower courts to base determinations of law on particular sets of facts. Thus, this Court has shown a reluctance to mire itself in *de novo* review of circuit courts' application of the public figure doctrine in particular cases,[76] absent an extraordinary abuse of discretion certainly not present in this unanimous Fifth Circuit decision. Accordingly, respondent Memphis Publishing

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[76] Arctic Co. v. Loudoun Times Mirror, 624 F.2d 518 (4th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3494 (U.S. Jan. 12, 1981) (No. 80-521); Rancho La Costa v. Superior court, 106 Cal. App. 3d 646, 165 Cal. Rptr. 347 (1980), *cert denied*, 49 U.S.L.W. 3616 (U.S. Feb. 23, 1981) (No. 80-853).

Co. respectfully requests that this Court deny the Petition for a Writ of Certiorari.

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